

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

TOTAL IMAGE SPECIALISTS, INC.

Employer <sup>1/</sup>

and

Case 9-RD-2132

CAROLYN A. MUSGROVE, AN INDIVIDUAL

Petitioner

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION,  
LOCAL UNION NO. 287, AFL-CIO

Union <sup>2/</sup>

**REGIONAL DIRECTOR'S DECISION AND**  
**DIRECTION OF ELECTION**

**I. INTRODUCTION**

The Employer is engaged in the manufacture of commercial signage at its facility located at 1877 E. 17<sup>th</sup> Avenue, Columbus, Ohio. The Employer and the Union have had a collective-bargaining relationship in excess of 20 years which has been embodied in successive contracts, including the current agreement that is effective from March 1, 2004 until midnight on February 28, 2007. The Petitioner filed a petition, amended at the hearing, under Section 9(c) of the National Labor Relations Act, seeking to decertify the Union as the bargaining representative of the unit set forth in the applicable agreement comprising the Employer's "production and maintenance associates employed in the classifications set forth herein at its facilities at 1877 E. 17<sup>th</sup> Avenue, Columbus, Ohio; but excluding all supervisors, clerical, layout, technical, and professional associates."

Based on the record and the post-hearing briefs of the parties, the sole issue for me to resolve is whether the decertification petitioner, Carolyn Musgrove, is a supervisor within the meaning of Section 2(11) of the Act as contended by the Union.<sup>3/</sup> Conversely, the Employer and the Petitioner assert that Musgrove is not a statutory supervisor. I find, for the reasons discussed

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> The name of the Union appears as amended at the hearing.

<sup>3/</sup> The Union contends that all of the Employer's lead persons are statutory supervisors. The parties stipulated and the record reflects that the leads possess the same duties and authority. However, as the supervisory status of the other leads is not in issue here, I make no specific finding regarding their supervisory status or lack thereof and rely on any testimony about their duties and authority only to the extent that such testimony aids me in a determination of Musgrove's status.

below, that Musgrove is not a supervisor within the meaning of Section 2(11) of the Act. Accordingly, I will direct an election in the bargaining unit to determine whether the employees in the unit wish to continue to be represented by the Union for the purposes of collective bargaining.

In reaching my determination on the issue, I have carefully considered the record evidence and the arguments made by the parties at the hearing and in their post-hearing briefs. To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operation. I will then present, in detail, the facts and reasoning that support my conclusions on the issue.

## **II. THE EMPLOYER'S OPERATION**

The Employer is engaged in the manufacture and assembly of interior and exterior signage, also referred to as image products, for retail and restaurant business enterprises in Ohio. An example provided by the record is the Employer's work for the Wendy's Restaurant chain in manufacturing various types of menu boards and related types of signs, some of which are utilized in the restaurants' interior and others used outside the restaurants, such as in the drive-through operation.

Dennis Koffman is the Employer's chief executive officer. Reporting directly to Koffman are Plant Superintendent Rick Stephens and Human Resource Manager Susan King. Stephens is responsible for daily operations at the Employer's facility and, in this capacity, he supervises the entire hourly workforce which fluctuates between approximately 25 to 50 employees. The record reflects, and the parties stipulated, that the above-named individuals are supervisors within the meaning of Section 2(11) of the Act.

The parties stipulated that the following individuals are managers who are not part of the bargaining unit: Inventory Control Supervisor Vernal Varney; Vice-President of Operations Russ Brown; Shipping Supervisor Pam Kelly; Engineering Manager Steve Suckolie; Client Service Supervisor Tina Wicks; CFO John D'Andria; Marketing and Sales Manager, Peter Verene and Sales Manager Ken Galloway.

The work flow process is initiated by a customer's sales order which is entered into the Employer's computer system. The sales orders go to the Planning Department which then reconciles the sales orders with the needed parts and generates work orders based on this assessment. The work orders are entered into the Employer's computer system and each day the lead person from the various manufacturing departments prints out the status of the jobs required to be performed. The work orders contain a break down of the projected time needed to complete each phase of the manufacturing process as well as an actual time when each particular aspect is to be completed. The computerized job requirement status information also provides the lead person with the manufacturing and shipping due date for assembled products.

Plant Superintendent Stephens, who is in charge of all of the lead persons, spends about 80 percent of his working time actively overseeing the manufacturing process. His office is on the plant floor. Stephens described the role of a lead person as being responsible for ensuring that the manufacturing and assembly processes in their respective departments are performed and to engage in "hands on" production to meet manufacturing goals. On two occasions, the

Employer has demoted lead persons who failed to ensure that employees were meeting performance requirements.

Carolyn Musgrove and Other Lead Persons:

Musgrove has been employed by the Employer for nearly 30 years. She is currently employed as a lead person in the Assembly B department and was promoted to that position in November 2003. In addition to Musgrove, the Employer has five other lead employees: John Masterson, weld shop lead; Jerry Dunn, sheet metal fabrication lead; Jack Cotrell, plastics fabrication lead; Al May, assembly A lead; and, Michael Spiert, stockroom lead. All of the lead persons are long-term employees of the Employer and have the same duties in their respective departments. Musgrove oversees the work of between 6 to 10 employees but only 2 of them are permanent employees of the Employer, while the others are designated as temporary.<sup>4/</sup> Cotrell also has 6 to 10 employees in the plastics fabrication department, but the record does not disclose how many of those employees are temporary. Masterson and Dunn, respectively, have two to three employees working with them. May oversees two employees and Spiert has one to two employees working with him.

Musgrove testified about her typical day. After punching a time clock a little before 5 a.m. each work day, she goes into an office, sits down at a computer and runs a printout of the “shop load” which lists all of the jobs that are in Musgrove’s department for that day. Musgrove then checks over the shop load to see if any new jobs have been added. If no new jobs have been added, Musgrove typically goes to the assembly B area where the other employees are waiting for her and starts working on or setting up jobs. If any of the jobs on the shop load list are new jobs, Musgrove will run pick lists from those particular work orders. She turns this pick list into the stock room and either returns to the department with the parts or a stockroom employee delivers the parts to the department. When all of the parts are available, Musgrove and the other employees begin to track, load and frame menu faces. Depending on the particular job, Musgrove may have two employees on one table tracking the faces and two on another table loading the faces. She decides who will perform available work by determining who is most proficient at a task based upon her observations and experience in performing the job.

Musgrove testified that on some occasions she has advised Stephens that temporary employees who work in her department have been unable to learn the jobs. Musgrove typically waits a few weeks to see if the temporary employee comprehends the job. If the employee is not grasping the work, Musgrove informs Stephens of the issue but does not make a recommendation. The record discloses that Stephens sometimes terminates temporary employees without a report from Musgrove or another lead person. On other occasions, Stephens will terminate a temporary employee after Musgrove or another lead person has informed him of an issue with an employee’s performance. When Musgrove has advised Stephens of such issues, he “usually” watches the temporary employee perform his or her duties to determine the employee’s continued employment status. On examination by the Union’s counsel, Musgrove conceded that she could not assert that Stephens made this type of independent review in every instance in which a temporary employee’s performance issues were reported to him.

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<sup>4/</sup> Throughout the transcript, employees who are not “permanent” employees covered under the applicable collective-bargaining agreement are referred to as temporary employees. The agreement, however, refers to such employees as probationary and it appears that the term temporary has been used merely to refer to probationary employees.

Lead persons report any quality or production issues to Stephens who then conducts an independent investigation regarding the problem. Lead persons ensure that employees in their respective departments punch in and out daily. They are not responsible for keeping employee's time, however, as Stephens calculates and verifies employees' time for the week. Lead persons report to Stephens when an employee is tardy. Only Stephens can authorize an employee to leave early.

The Employer's lead person job description defines the role of a lead person as follows:

. . . the Lead Person reports to the department Supervisor for the overall operation of the manufacturing/assembly areas. The primary function of the Lead Person is to provide a technical role in the fabrication/assembly of products. In addition, the Lead Person must have the ability to exercise good judgment to produce quality work and to ensure that internal and external customer needs are met.

Among the lead person's "essential responsibilities" according to the job description are to "guide and direct employees within the department," and lead persons "will be held accountable for meeting on-time delivery, production standards and safety of each employee within the department."

Lead persons are specifically included as members of the bargaining unit under the applicable collective-bargaining agreement. They receive a 50 cent increase added to their hourly wage rate for performing lead person duties. Lead persons are generally among the highest paid employees by virtue of their experience, skills and seniority with the Employer, rather than as a result of their lead person status. Lead persons receive the same benefits as other hourly employees.

### **III. THE LAW AND ITS APPLICATION**

As initially noted, the only issue for my consideration is whether the decertification petitioner, Carolyn A. Musgrove, is a statutory supervisor. The Board has long held that the clear language of the Act does not permit a statutory supervisor to file a decertification petition as such a petition may be filed only "by an employee or group of employees or any individual or labor organization acting in their behalf. . . ." *Clyde J. Merris*, 77 NLRB 1375, 1376 (1948), quoting Section 9(c)(1)(A) of the Act; see also, *Modern Hard Chrome Service Company*, 124 NLRB 1235 (1959). Accordingly, "employee status is an indispensable jurisdictional prerequisite to the validity of such a petition." *Modern Hard Chrome*, supra at 1237. If Musgrove is a statutory supervisor, I must dismiss the petition. *Modern Hard Chrome*, supra; *Carey Transportation*, 119 NLRB 332 (1958).

Before analyzing Musgrove's specific duties and authority, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether Musgrove possesses any of the supervisory indicia set forth in Section 2(11), I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” In re, *Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board recently revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court’s finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (September 29, 2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (September 29, 2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court’s rejection of the Board’s interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted “definitions for the term ‘assign,’ ‘responsibly to direct,’ and ‘independent judgment’ as those terms are used in Section 2(11) of the Act.” *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion “assign,” the Board noted that this factor shares with other Section 2(11) criteria the “common trait of affecting a term or condition of employment” and determined to construe the term “assign” “to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee.” Id, slip op. at 4. The Board reasoned that, “It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function.” Id. The Board clarified that, “. . . choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’” Id.

The Board sought to define the parameters of the term “responsibly to direct” by adopting the definition established by the Fifth Circuit in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, (5<sup>th</sup> Cir. 1986):

To be responsible is to be answerable for the discharge of a duty or obligation . . . . In determining whether “direction” in any particular case is responsible, the focus is on whether the alleged supervisor is “held fully accountable and responsible for the performance and work product of the employees” he directs . . . . Thus in *NLRB v. Adam [&] Eve Cosmetics, Inc.*, 567 F.2d 723, 727 (7<sup>th</sup> Cir. 1977), for example, the court reversed a Board finding that an employee lacked supervisory status after finding that the employee had been reprimanded for the performance of others in his Department. (at 1278). *Oakwood*, slip op. at 6 – 7.

In agreeing with the circuit courts that have considered the issue, the Board found that “for direction to be ‘responsible,’ the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly.” In clarifying the accountability element for “responsibly to direct” the Board noted that, “to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id, at 7.

In *Kentucky River*, the Supreme Court rejected the Board's interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." *NLRB v. Kentucky River Medical Center, Inc.*, 532 U.S. at 713. Following the admonitions of the Supreme Court, the Board in *Oakwood* adopted an interpretation of the term "independent judgment" that "applies irrespective of the Section 2(11) supervisory function implicated, and without regard to whether the judgment is exercised using professional or technical expertise . . . professional or technical judgments involving the use of independent judgment are supervisory if they involve one of the 12 supervisory functions of Section 2(11)." *Supra*, slip op. at 7. The Board noted that the term "independent judgment" must be interpreted in contrast with the statutory language, "of a merely routine or clerical nature." *Id.*, slip op. at 8. Consistent with the view of the Supreme Court, the Board held that, "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* (citation omitted) However, ". . . the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." *Id.*

With respect to the supervisory status of Musgrove, I have examined the record in light of the precedent discussed above and find that she is not a supervisor within the meaning of Section 2(11) of the Act. First, I note that there is no contention or evidence that Musgrove or any of the other lead persons has the authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, assign, reward, discipline other employees, or to adjust their grievances, or effectively to recommend such action. The Union contends that Musgrove has effectively recommended the discharge of employees and that she responsibly directs employees in the performance of their duties. It further asserts that lead persons, although not necessarily Musgrove, have evaluated employees and thereby effectively recommended promotion through the wage scale set forth in the applicable agreement.

I turn first to a consideration of whether Musgrove can or has effectively recommended the discharge of employees. The record discloses that Musgrove, and presumably other lead persons, report performance issues of employees, in particular of temporary employees, to Stephens. The record establishes that Stephens is frequently on the plant floor and has every opportunity to observe employees' performance. Additionally, Musgrove testified that, at least in some instances, Stephens observed temporary employees whom she had indicated were experiencing performance issues. Contrary to the Union's contention in brief, however, there is no evidence that Stephens "generally discharges" temporary employees whom Musgrove has reported to him are experiencing performance issues. Moreover, there is no evidence that Stephens terminates employees based on a "cursory inquiry on her word." The precise degree of any independent review conducted by Stephens in connection with a lead person's report that a temporary employee is experiencing performance issues is not contained in the record. In this regard, I note that Stephens was present at the hearing and could have been called and questioned by the Union on this point. Succinctly, as noted above, it is the obligation of the party asserting supervisory status to prove such status. *Dean & Deluca, New York, Inc.*, *supra*. The Union failed to do that here with respect to Musgrove based on the criterion of effectively recommending discharge.

Next in determining Musgrove's status, I turn to a consideration of whether she responsibly directs other employees' work. I do so being mindful of the Supreme Court's admonitions in *Kentucky River* and the Board's recent decisions defining the terms "to

responsibly direct” as well as the term “independent judgment.” It is clear on the record that the Employer holds lead persons responsible for ensuring that their respective departments comply with the Employer’s established production and quality goals. The penalty for noncompliance, in at least some instances, has been demotion from the lead person role and the consequent loss of the 50 cent hourly incentive specified in the collective-bargaining agreement for performing such duties. Thus, the “accountability” element of responsible direction exists with respect to the Employer’s lead persons.

With regard to the direction of employees, however, the record establishes that the employees in Musgrove’s department perform the same generalized repetitive manufacturing and assembly tasks on a day-to-day basis. There is scant record testimony regarding the degree of variance of these duties. Musgrove uses her extensive experience in the Assembly B department to instruct employees in the performance of particular tasks. The record discloses, however, that Musgrove follows the Employer’s detailed work orders in order to complete tasks in her department. These work orders specify how each job is to be completed, the amount of time allotted for her department’s completion of its portion of the job and the timing in which each job must be completed. Thus Musgrove has little, if any, discretion in the performance of such jobs. Accordingly, I find that Musgrove lacks independent judgment with regard to the direction of work in her department. In reaching this conclusion, I note that not only is her judgment constrained by the Employer’s explicit directives, but that many of the tasks performed by employees in the department are performed by temporary (probationary) employees with very little experience or training. I infer from this fact and the lack of any contrary evidence in the record, that the tasks performed by employees in the department are routine and repetitive and do not require the exercise of independent judgment. Based on the foregoing, and the record in its entirety, I find that Musgrove does not engage in responsible direction of employees as that term is defined by the Board and I do not find Musgrove to be a statutory supervisor based on the possession or exercise of this supposed authority.

Finally, with regard to the Musgrove’s alleged role in effectively recommending employees for promotions, I find that the record fails to support the Union’s claims on this point. The evidence shows that Musgrove, like other lead persons, provides oversight with regard to both permanent and temporary (probationary) employees who work in their respective departments. Permanent employees advance from lower to higher paid rates pursuant to the Employer’s contractual wage scale. However, there is no evidence that Musgrove makes recommendations with respect to whether an employee merits a promotion. In this regard, I note that the Employer’s facility is a small manufacturing and assembly operation and that Plant Superintendent Stephens is on the plant floor approximately 80 percent of the time. Thus, he does not have to rely on lead persons for reports on employee work performance but has the opportunity to regularly observe such performance for himself.

Based on the foregoing, and the record in its entirety, I find that Musgrove does not promote employees or effectively recommend such promotions and I do not find her to be a statutory supervisor based on the possession or exercise of this supposed authority.

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in their post-hearing briefs, I conclude that the Union has not met its burden establishing that Musgrove is a statutory supervisor. See, *Dean & Deluca New York, Inc.*, supra. In reaching this conclusion I have fully considered the cases cited by the Employer and the Union in their respective briefs and have found that no case cited compels a

contrary result. Accordingly, I will direct an election in the unit which the Petitioner seeks to decertify and which I find is appropriate for collective bargaining.<sup>5/</sup>

#### **IV. SUPERVISORY EXCLUSIONS FROM THE UNIT**

The parties agree, the record shows, and I find that the following persons are supervisors within the meaning of Section 2(11) of the Act and I will exclude them from the unit: Dennis Koffman Chief Executive Officer; Rick Stephens, Plant Superintendent and Susan King, Human Resource Manager.

#### **V. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the above discussion, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims that the Union does not represent a majority of the unit employees.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance associates employed in the classifications set forth [in the current collective-bargaining agreement between the Employer and the Union] at its facilities at 1877 E. 17<sup>th</sup> Avenue, Columbus, Ohio; but excluding all supervisors, clerical, layout, technical, and professional associates.

#### **VI. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Sheet Metal Workers International Association, Local Union No. 287, AFL-CIO. The date, time, and place of the

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<sup>5/</sup> Although the Union contends that Musgrove and the other lead persons possess certain secondary indicia of supervisory status, I note that secondary indicia is insufficient to confer supervisory status where the evidence fails to establish that the individual in dispute possesses one or more of the primary Section 2(11) indicia. *Crittendon Hospital*, 328 NLRB 879 (1999). As I have found that Musgrove lacks any primary indicia of Section 2(11) statutory authority, I find it unnecessary to address the Petitioner's contentions regarding secondary indicia.

election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

#### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **February 1, 2007**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **VII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001, or electronically pursuant to the guidance that can be found at the Agency's Website at [www.nlr.gov](http://www.nlr.gov). Select the **E-Gov** tab and click on **E-Filing**, then select the type of document you wish to file electronically and you will navigate to detailed instructions on how to file the document. This request must be received by the Board in Washington by 5 p.m., EST on **February 8, 2007**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 25<sup>th</sup> day of January 2007.

/s/ Gary W. Muffley, Regional Director

Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

### **Classification Index**

177-8560-1000  
177-8560-1500  
177-8560-8000